UNITED ORIENTAL ASSURANCE SDN. BHD.

v.

LIM ENG YEW

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR LP
MOHD. YUSOF MOHAMED SCJ
GUNN CHIT TUAN SCJ
[SC CIVIL APPEAL NO. 315 OF 1988]
6 SEPTEMBER 1991

DAMAGES: *Personal injury - Third party policy - Judgment obtained by passenger against driver - Whether insurer liable to indemnify driver - Construction of policy - Exceptions - Meaning of 'by reason of or in pursuance of a contract of employment' - Road Traffic Ordinance 1958, ss. 74(1), 75(1), 80.*

INSURANCE: *Third party risk - Judgment obtained by passenger against driver - Whether insurer liable to indemnify driver - Exceptions - Construction of policy - Meaning of 'by reason of or in pursuance of a contract of employment' - Road Traffic Ordinance 1958, ss. 74(1), 75(1), 80.*

The appellants were at all material times the insurers at risk for motor lorry No. AL 1577 (the said vehicle) which was owned by LYP. The respondent L, obtained judgment for general and special damages on 15 June 1978 against LSK, the authorised driver of the said vehicle in respect of severe injuries sustained while he (L) was being carried as a passenger on 26 June 1972, pursuant to a contract of employment between L and LYP.

On 18 April 1979 L's solicitors served the said judgment on the appellant's solicitors demanding settlement of the judgment sum; however on 26 April 1979 the appellant's solicitors replied denying liability on the part of their client, and reliance was placed on the exceptions to s. II of the said policy on liability to third party. The learned Judge of the High Court held that L was a passenger carried by reason of and in pursuance of the contract of employment and that therefore, the appellants were liable to pay the amounts due under the said judgment. Hence this appeal.

The issue was whether the appellants had a duty to satisfy the judgment obtained against LSK in respect of the third party risk, which in turn involved the interpretation and applicability of ss. 75(1) and 80 of the Road Traffic Ordinance 1958 (the said Ordinance) and the relevant exceptions to liability as were contained in the instant policy.

Held:

[1] L was working as a salesman for the registered owner of the said vehicle selling biscuits and going from place to place in the said vehicle and was therefore required by his contract of employment with his employer, LYP, to travel on the lorry.

[2] Section 80(1) of the Ordinance refers to s. 75(1) concerning the requirements in respect of policies relating to third party risks; upon a proper construction of s. 75(1) of the Ordinance, and the proviso (which states that such policy shall not be required to cover liability in respect of death arising out of and in the course of the employment of a person insured by the policy) it is clear that L fell under the exception (ii) of the proviso, that is, 'motor vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment'.

[3] Furthermore, exception (iii) to the Exceptions to s. II of the policy also made the appellant liable because L was a 'passenger carried by reason of or in pursuance of a contract of employment'.

[4] Another relevant important provision in the policy was cl. 2, an examination of which shows that the appellants are obliged to indemnify the driver in this case, LSK, who was covered by the policy and who was entitled to be indemnified by the appellant against the damages which he had to pay to L.

[Appeal dismissed with costs.]

[**Bahasa Malaysia** Translation of Headnote]

GANTIRUGI: *Kecederaan diri - Polisi insuran pihak ketiga - Penghakiman diperolehi oleh penumpang terhadap pemandu - Sama ada pihak insuran berkewajipan menanggung gantirugi - Pentafsiran polisi - Pengecualian - makna 'atas sebab atau menurut satu kontrak pekerjaan' - Ordinan Lalulintas Jalan 1958, ss. 74(1), 75(1), 80.*

INSURAN: *Risiko pihak ketiga - Penghakiman diperolehi oleh penumpang terhadap pemandu - Sama ada pihak insuran berkewajipan menanggung gantirugi - Pengecualian - makna 'atas sebab atau menurut satu kontrak pekerjaan' - Ordinan Lalulintas Jalan 1958, ss.74(1), 75(1), 80.*

Perayu adalah pihak insuran bagi motor lori AL 1577 (kenderaan tersebut) kepunyaan LYP. Pada 15 Jun 1978 responden L telah mendapatkan penghakiman terhadap LSK iaitu pemandu yang diberikuasa memandu kenderaan tersebut. Penghakiman itu adalah bagi gantirugi am dan gantirugi khas yang timbul akibat dari kecederaan parah yang dialami oleh L pada 26 Jun 1972 semasa ia dibawa sebagai seorang penumpang dalam kenderaan tersebut menurut satu kontrak pekerjaan di antara beliau dan LYP.

Pada 18 April 1979 Peguam L telah menyerahkan penghakiman tersebut kepada Peguam pihak merayu dan menuntut penjelasan jumlah gantirugi dalam penghakiman itu. Seterusnya pada 26 April 1979 Peguam pihak merayu memberi jawapan bahawa pelanggan mereka (pihak insuran) tidak berkewajipan menanggung kerugian itu dan merujuk kepada pengecualian di bawah s. II polisi insuran berkenaan yang berkaitan dengan soal tanggungan terhadap pihak ketiga. Hakim Mahkamah Tinggi yang arif memutuskan bahawa L adalah seorang penumpang yang dibawa atas sebab dan menurut satu kontrak pekerjaan dan oleh itu, perayu adalah berkewajipan membayar jumlah gantirugi di bawah penghakiman itu. Justeru itu rayuan ini dibuat.

Isu untuk dipertimbangkan adalah sama ada perayu berkewajipan membayar jumlah gantirugi yang diperolehi melalui penghakiman terhadap LSK berkaitan dengan risiko pihak ketiga, dan isu ini juga melibatkan pentafsiran dan penggunaan ss. 75(1) dan 80 Ordinan Lalulintas 1958 (Ordinan tersebut) serta pengecualian relevan mengenai tangunggan yang terkandung dalam polisi insuran berkenaan.

Diputuskan:

[1] L bekerja sebagai jurujual bagi tuanpunya berdaftar kenderaan tersebut dan menjual biskut dari setempat ke setempat lain dalam kenderaan tersebut dan dikehendaki oleh kontrak pekerjaannya dengan majikannya LYP untuk menaiki kenderaan tersebut.

[2] Seksyen 80(1) Ordinan tersebut merujuk kepada s. 75(1) yang berkaitan dengan polisi-polisi insuran berhubung dengan risiko pihak ketiga; mengikut pentafsiran s. 75(1) Ordinan tersebut proviso itu (yang menyatakan bahawa polisi itu tidak diperlukan untuk menanggung kewajipan bagi kematian yang timbul dalam proses pekerjaan seseorang yang diinsurankan di bawah polisi) adalah jelas bahawa L termasuk dalam pengecualian (ii) di bawah proviso yang berkaitan iaitu 'kenderaan dalam mana penumpang dibawa samada bagi upah atau ganjaran atau atas sebab atau menurut satu kontrak pekerjaan'.

[3] Tambahan pula, pengecualian (iii) yang terkandung dalam pengecualian di bawah s. II polisi tersebut juga membuat perayu bertanggungjawab kerana L adalah seorang 'penumpang yang dibawa atas sebab atau menurut satu kontrak pekerjaan'.

[4] Satu lagi peruntukan yang relevan dalam polisi itu adalah fasal 2, yang setelah diteliti menunjukkan bahawa perayu sepatutnya membayar gantirugi bagi pihak pemandu iaitu LSK yang juga merupakan pihak yang diliputi oleh polisi itu. LSK berhak untuk mendapatkan perlindungan tanggungrugi daripada perayu untuk gantirugi yang wajar dibayar olehnya kepada L.

[Rayuan dibatalkan dengan kos.]

Cases referred to:
Chan Kum Fook & Ors. v. The Welfare Insurance Co. Ltd. [1975] 2 MLJ 184 ***(cit)***
China Insurance Co. Ltd. v. Teh Lain Lee & Anor. [1977] 1 MLJ 1 ***(cit)***
Izzard v. Universal Insurance Co. [1937] AC 733 ***(cit)***
Lees v. Motor Insurers Bureau [1952] 2 All ER 511 ***(cit)***
Richards v. Cox [1942] 2 All ER 624 ***(cons)***
Saw Poh Wah v. Ooi Kean Hang & Anor. (Asia Insurance Co. Ltd. as Third Party) [1985] 2 MLJ 387 ***(dist)***
Tan Keng Hong & Anor. v. Fatimah binti Abdullah & Ors. [1974] 1 MLJ 156 ***(dist)***
Tan Keng Hong & Anor. v. New India Assurance Co. Ltd. [1978] 1 MLJ 97 ***(cons)***
Vandyke v. Fender & Anor. Sun Insurance Office Ltd. (Third Party) [1970] 2 QB 292 ***(cit)***

Legislation referred to:
Motor Vehicles (Third Party Risks and Compensation) Act [Sing], ss. 4(3), 8(1)
Road Traffic Act 1930 [UK], ss. 35(1), 36(1)(b)
Road Traffic Act 1960 [UK], s. 203(4)
Road Traffic Ordinance 1958, ss. 74(1), 75(1)(b), 80(1)

For the appellant - S. Radhakrishnan; M/s. Shearn Delamore & Co.
For the respondent - Wong Soon Foh; M/s. Chooi & Co.

JUDGMENT

Gunn Chit Tuan SCJ:

This was a claim by one Lim Eng Yew (the plaintiff, who was an employee of one Lim Yoke Pak t/a Chop Pak Kee, a sundry wholesaler, pursuant to the provisions of s. 80(1) of the Road Traffic Ordinance 1958 (the Ordinance), concerning the duty of insurers to satisfy judgments against persons insured in respect of third party risks.

The said Lim Yoke Pak was the registered owner of a motor lorry No. AL 1577 (the said vehicle), which had a "C" carrier's licence and was insured with third party risks under a commercial vehicle policy issued by the Oriental Fire and General Co. Ltd., the predecessor of the United Oriental Assurance Sdn. Bhd. (the defendant), for the period 1 May 1972 to 30 April 1973.

On 26 June 1972, the plaintiff sustained severe personal injuries when the said vehicle driven by one Lim See Keong as servant or agent of the said Lim Yoke Pak went off the road and landed in a ditch. At the time of the accident, the plaintiff was being carried as a passenger in the said lorry pursuant to a contract of employment between him and the owner of the lorry, the said Lim Yoke Pak.

On 7 June 1977, the plaintiff sued Lim See Keong, the authorised driver of the lorry at the time of the accident, and on 15 June 1978, he obtained judgment against him for damages arising out of the accident in the sum of RM120,000 being general and special damages with interest and costs. Costs were subsequently agreed at RM3,000 in lieu of taxation. On 18 April 1979, the plaintiff, through a firm of solicitors served a notice on M/s. Shearn Delamore & Co., the solicitors for the defendant, demanding payment of the judgment sum, and on 26 April 1979, M/s. Shearn Delamore & Co. replied that there was no liability on the part of their client, the defendant.

In the Court below, when the learned Judge gave judgment for the plaintiff, he referred to the exceptions to s. II of the said policy on liability to third party, which provided *inter alia* as follows:

> The company shall not be liable in respect of:
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> (i) death, bodily injury or damages caused or arising beyond the limits of any carriageway or thoroughfare in connection with the bringing of the load to the motor vehicle for loading thereon or the taking away of the load from the motor vehicle after unloading therefrom
>
> (ii) death of or bodily injury to any person in the employment of the insured arising out of and in the course of such employment
>
> (iii) death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon or entering or getting on to or alighting from the motor vehicle at the time of occurrence of the event out of which any claim arises.

The learned Judge was of the opinion that the above-quoted exception (iii) to the exceptions to s. II above made the defendant liable because the plaintiff was "a passenger carried by reason of or in pursuance of a contract of employment". He relied on the Singapore High Court case of *Chan Kum Fook & Ors. v. The Welfare Insurance Co. Ltd.* [1975] 2 MLJ 184, in which case Tan Ah Tah J in construing a similar clause in a policy issued by the defendants in that case, held that the effect of the words in exception (iii), that is, "other than a passenger carried by reason of or in pursuance of a contract of employment" is to make the defendants liable in respect of injuries sustained by the plaintiffs who were passengers "carried by reason of or in pursuance of a contract of employment". Ajaib Singh J as he then was, in this case also relied on *China Insurance Co. Ltd. v. Teh Lain Lee & Anor.* [1977] 1 MLJ 1, in which the Singapore Court of Appeal, in dismissing an appeal against the judgment of D'Cotta J in the High Court, held '*inter alia*' that the words (in exception (iii), that is, "other than a passenger carried by reason of or in pursuance of a contract of employment") is to make the defendants in that case liable as a result of the death of the deceased because at that time deceased was being "carried by reason of or in pursuance of a contract of employment". In that case, the Singapore Court of Appeal referred to and approved the High Court decision in Tan Ah Tah J's judgment in *Chan Kum Fook & Ors. v. The Welfare Insurance Co. Ltd.* (*supra*). It is to be noted that ss. 4(3) and 8(1) of the Singapore Motor Vehicles (Third Party Risks and Compensation) Act referred to in those Singapore cases are in *pari materia* with ss. 75(1) and 80(1) of the Ordinance.

Now s. 80(1) of the Ordinance refers to s. 75 of the Ordinance concerning the requirements in respect of policies in respect of third party risks. For the purposes of this appeal, it is relevant to refer to the following provisions of s. 75(1) of the Ordinance:

> 75. (1) In order to comply with the requirements of this part of this Ordinance a policy of insurance must be a policy which:
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> (a) is issued by a person who is an authorised insurer within the meaning of this part of this Ordinance; and
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> (b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road:
>
> Provided that such policy shall not be required to cover:
>
> (i) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or
>
> (ii) except in the case of a motor vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the motor vehicle at the time of the occurrence of the event out of which the claims arise; or
>
> (iii) any contractual liability.

It will be noticed from the above-quoted s. 75(1) of the Ordinance that the proviso states that such policy shall not be required to cover liability in respect of death arising out of and in the course of his employment of a person insured by the policy or **except** in the case of a motor vehicle in which passengers are carried for hire or reward **or by reason of or in pursuance of a contract of employment**.

During his submission before us, Mr. Radhakrishnan, Counsel for the defendant, referred to *Tan Keng Hong & Anor. v Fatimah Binti Abdullah & Ors.* [1974] 1 MLJ 156. That was also a case involving a lorry insured by insurers under a third party policy which excepted liability for death caused to any person carried on the vehicle (other than a passenger carried by reason of or in pursuance of a contract of employment). A deceased person who was getting a free lift on the lorry was killed when the lorry overturned. The Federal Court, in dismissing an appeal to it, held that as it appeared in that case that the deceased was getting a free lift on the lorry, the learned trial Judge was right in holding that the insurers were not liable under the policy to indemnify the appellants who were the driver and owner of the lorry.

We were also referred by Counsel to *Saw Poh Wah v. Ooi Kean Hang & Anor. (Asia Insurance Co. Ltd. as Third Party)* [1985] 2 MLJ 387. That was again a case involving an insurance policy with a similar clause which excludes liability of the insurance company in respect of death of any person (other than a passenger carried by reason of or in pursuance of a contract of employment). In that case Syed Agil Barakbah J as he then was, held that the plaintiff, who was at all material times employed by the registered owner of the vehicle as an attendant, was covered by the insurance policy and that the insurers as third party should therefore indemnify the owner of the lorry and his driver on the judgment entered for the plaintiff. The third party, that is, the insurance company, appealed against the said decision and the Federal Court allowed the appeal of the insurer without delivering a written judgment. The Federal Court held that there was no cross-appeal by the respondents against

the trial Judge's finding that the plaintiff (the lorry attendant) was not a passenger and, as such, the learned Judge should have held that the relevant clause of the policy applied and the insurer was not liable to indemnify the defendants. That case is again distinguishable from the present one in that the learned Judge there had made a finding of fact that the lorry attendant was not a passenger whereas, in our present case, the learned Judge held that the plaintiff was "a passenger carried by reason of and in pursuance of a contract of employment". Dato' Wong Soon Foh, Counsel for the plaintiff, merely referred to the exceptions to s. II of the said policy and contended that the above-quoted exception (ii) did not apply and that exception (iii) applied in this case. He also pointed out that the facts in the two above-quoted Malaysian cases were distinguishable from the present one.

Now it is interesting to refer to the following passage in the judgment of Lord Goddard CJ in *Lees v. Motor Insurers Bureau* [1952] 2 All ER 511, which was a decision concerning ss. 35(1) and 36(1)(b) of the former U.K. Road Traffic Act 1930, which provisions are in *pari materia* with ss. 74(1) and 75(1)(b) of our Ordinance:

> In *Richards v. Cox* [1942] 2 All ER 624 the same state of affairs arose as is present here, the person injured and the driver of the car being both in the employ of the owner of the car. The driver was negligent, and the plaintiff recovered damages in an action against him. The question then arose whether the policy obliged the underwriters to indemnify the driver, and it was held that it did by reason of its terms which provided:
>
> > In terms of and subject to the limitations of and for the purposes of this section the company will treat as though he were the insured person any person who is driving such vehicle on the insured's order or with his permission provided (a) that such person is not entitled to indemnity under any other policy.
>
> It was held that there were in effect two policies in one document, a policy insuring the owner of the vehicle and a policy insuring the driver. The owner of the vehicle would not have been able to recover against the underwriters because the policy did not cover his liability to his own servant, but as the terms of policy insured the driver himself, and as the injured person was not a servant of the driver, nevertheless the driver was covered by the policy and was entitled to an indemnity by the insurance company against the damages which he had to pay.

In *Lees* case (*supra*), Lord Goddard CJ did not find any such term in the policy and he was unable to hold in that case that there was not a policy in force which complied with the Act of 1930 and covered all the persons whom the Act required to be covered, but it excluded liability in respect of the employees of the insured, and the underwriters were entitled to exclude that liability under the proviso to s. 36(1)(b). It is therefore necessary in each case to examine the wording of the policy in question and in our present case, we have examined the policy issued by the defendant and we found the following important provision in it:

> 2. In terms of and subject to the limitations of and for the purposes of this section the company will indemnify any authorised driver who is driving the motor vehicle provided that such authorised driver:
>
> (i) shall as though he were the insured observe fulfil and be subject to the terms of this policy insofar as they can apply
>
> (ii) is not entitled to indemnity under any other policy

which is practically identical with the relevant provision in the policy in *Richards v. Cox* (*supra*), and which would oblige the defendant to indemnify the driver in this case, who was covered by the policy and was entitled to be indemnified by the defendant against the damages which he had to pay to the plaintiff.

Although the provisions of the present English Road Traffic Act 1960, are not in *pari materia* with those of our Road Traffic Ordinance 1958, we would, however, refer to one English case decided under their present Act, namely *Vandyke v. Fender & Anor. Sun Insurance Office Ltd. (Third Party)* [1970] 2 QB 292, which is a decision under s. 203(4) of the U.K Road Traffic Act 1960. In that section, there appears the words:

> shall not have effect in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment.

In that case, Lord Denning, Master of the Rolls, referred to those words and expressed the view that "passengers are carried in a vehicle "by reason of" a contract of employment whenever such a contract is the cause or one of the causes, of their being carried. If they are carried in it habitually or as a matter of practice, the vehicle must be covered in respect of them". In that case, as the plaintiff was not obliged to travel in the car provided, the injury sustained by him did not arise out of or in the course of his employment and the U.K. Court of Appeal held that the third party insurers were not therefore liable to indemnify the employers.

Apart from the Malaysian cases quoted as well as the non-Malaysian cases which are of course persuasive authorities, there is another relevant case which should be considered, that is, *Tan Keng Hong & Anor. v. New India Assurance Co. Ltd.* [1978] 1 MLJ 97. In that case, their Lordships of the Privy Council held in 1978 that the words "by reason of his contract of employment" must be read in conjunction with the words "in pursuance of", and properly construed, mean because the contract of employment expressly or impliedly requires the employee or gives him the right to travel in the motor vehicle concerned. In that case, Their Lordships referred to *Izzard v. Universal Insurance Co.* [1937] AC 733 and pointed out that Lord Wright, with whose speech Lords Atkin, Thankerton, Russell of Killowen and Roche agreed, said at p. 782:

> I think the Act (the language of which is the same as that of the policy) is dealing with persons who are on the insured vehicle for sufficient practical or business reasons, and has taken a contract of employment in pursuance of which they are on the vehicle as the adequate criterion of such reasons.

In *Tan Keng Hong's* case (*supra*), the Privy Council pointed out that on the facts as found, the deceased forester was certainly not on the lorry for business reasons but for personal reasons, that is, for his own personal convenience. In that case, there was no term of the forester's contract of employment, express or implied, which required or entitled him to travel on the appellant's lorry and therefore the insurers were rightly held not to be liable under the policy. In our present case, the plaintiff was working as a salesman for the registered owner of the said vehicle selling biscuits and going from place to place in the said vehicle. He was therefore required by his contract of employment with his employer the said Lim Yoke Pak to travel on the lorry (*vide* the notes of evidence in pp. 27 to 28 of the appeal records). In the circumstances of this case, we therefore consider that the learned Judge was right in deciding that upon a proper construction of the policy of insurance dated 19 May 1972, and ss. 75(1) and 80(1) of the Ordinance, the defendant was liable to pay the plaintiff the amount due under the judgment dated 15 June 1978. We would therefore dismiss the appeal with costs.

There is however one observation which we ought to make and that this suit was filed in June 1980 and was not heard by the High Court until more than seven years later on 17 September 1987. Judgment was finally delivered by the High Court on 27 June 1988. We

would therefore urge all High Court Judges who hear such claims for damages due to motor accidents to try these cases as early as possible so that a plaintiff who succeeds in getting damages as in this case would not have to wait for more than a decade before getting his compensation.

Also found at [1991] 3 CLJ 2418